IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENE CHRISTOPHER SMITH, et al.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
FIRST UNION MORTGAGE CORP., et al.	:	**NO. 98-5360**

MEMORANDUM ORDER

Presently before the court is plaintiffs' unopposed Motion for Preliminary Approval of Settlement and Notice to Class. Plaintiffs seek provisional certification of a class pursuant to Fed. R. Civ. P. 23(b)(3) for the purpose of settlement and preliminary approval of the parties' settlement agreement of July 2, 1999.

The essence of the claims asserted by the representative plaintiffs is that defendants First Union Mortgage Corporation and Hutchens, McCalla, Raymer & Echevarria violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., by sending virtually identical deceptive debt collection letters to the class members. The proposed class consists of all persons who received or will receive these letters from October 7, 1997 to the "effective date" which is defined as the third business day after termination of any right to appellate review of the "final order" approving the settlement, except for those who previously released their claims against defendants.

A class may be conditionally certified even for the purpose of settlement only if it conforms to the requirements of Rule 23. See Amchem Products, Inc. v. Windsor, 117 S. Ct. 2231, 2248 (1997); In re Prudential Ins. Co. v. America Sales Litigation, 148 F.3d 283, 307-08 (3d Cir. 1998). While the settlement class must satisfy each of the requirements of Rule 23(a) and 23(b)(3), the fact of settlement is relevant to a determination of whether the proposed class meets the requirements imposed by the Rule. Id. Rule 23(a) requires that the proposed class satisfies the criteria of numerosity, commonality, typicality and adequacy of representation.

In evaluating a settlement for preliminary approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval. See In re Prudential Securities Incorporated Limited Partnerships Litigation, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (citing Manual for Complex Litigation § 30.41 at 237 (3d ed. 1995)).

Numerosity is satisfied when the class is so numerous that joinder of all class members is impracticable. See In re Prudential Ins., 148 F.3d at 309. Although the putative class

members are identified and their addresses are known, the ability of class members to pursue individual suits given the relatively limited amount of damages sustained by each is doubtful, see Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 74 (D.N.J. 1993), and joinder of all of the estimated 288 class members would be impracticable. See Weiss v. York Hosp., 745 F.2d 786, 809 n.35 (3d Cir. 1984) (numbers exceeding one hundred will generally sustain numerosity requirement), cert. denied, 470 U.S. 1060 (1985).

Commonality is satisfied when there are questions of law or fact common to the class but does not require an identity of claims or a lack of "factual differences among the claims of the putative class members." In re Prudential, 148 F.3d at 310. The alleged existence of a common unlawful practice generally satisfies the commonality requirement. See Anderson v. Dep't. of Public Welfare, 1 F. Supp.2d 456, 461 (E.D. Pa. 1998). There are common questions of fact and law due to the near identity of the letters sent to the class members and the same legal standard which governs each class member’s claim. Each letter allegedly reflects a common improper debt collection practice.

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." See Georgine v. Amchem Products, Inc., 83 F.3d 610, 631 (3d Cir. 1996). The claims of the representatives are

typical because the class members received virtually identical letters and the claims of each class member and each representative are advanced under the same legal theory and arise from the same practice or course of conduct. See Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992).

Adequacy of representation requires that the interests of the named plaintiffs are aligned with those of the absentees and that the class counsel is qualified and generally able to conduct the litigation in the interest of the entire class. See Georgine, 83 F.3d at 630. There is no apparent conflict of interests between the representative plaintiffs and other class members. The class counsel appears able adequately to represent the proposed class.

Rule 23(b)(3) sets forth the additional requirements of predominance and superiority. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, 117 S. Ct. at 2249. Predominance is "readily met in certain cases alleging consumer or securities fraud." Amchem, 117 S. Ct. at 2250. This case which involves use of virtually identical misleading letters sent to each class member falls into such a category. See In re Prudential Ins., 148 F.3d at 314. Common questions of law and fact predominate because of the virtually identical factual and legal predicates of each class member’s claim.

"The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." Id. at 316 (quotations omitted). Any interest of members of the class in individually controlling the prosection of separate actions, see 23(b)(3)(A), is outweighed by the efficiency of the class mechanism as each individual claim is sufficiently small to make individual suits impractical. See In re Prudential Ins., 148 F.3d at 316 (modest size of individual claims suggests class procedure is superior). There is no evidence that other litigation is pending between the parties. See 23(b)(3)(B). As all but ten of the proposed class members are Pennsylvania residents, it is appropriate that the claims are concentrated in this forum. See 23(b)(3)(C). Potential management problems at trial need not be considered because this is a settlement class. See Amchem Products, 117 S. Ct. at 248. Moreover, no such problems are apparent.

Inclusion in the class of people who may in the future receive an actionable letter from defendant, however, is problematic. Courts have certified classes with potential future members where declaratory or injunctive relief was sought. Where only damages are sought, however, courts have found the inclusion of potential future members to be improper. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir. 1974) (if

injunctive relief is unnecessary, inclusion in class of persons who would qualify only upon occurrence of future event would be improper); Strong v. Arkansas Blue Cross and Blue Shield, Inc., 87 F.R.D. 496, 508 (E.D. Ark. 1980) (claims of future class members not yet injured were not justiciable). See also 7B Charles Alan Wright et al., Federal Practice and Procedures § 1785.1 (2d ed. Supp. 1998) (noting that decisions allowing class participation by persons who may but have yet to sustain an injury have been "severely criticized").

Plaintiffs initially included claims for declaratory and injunctive relief. The proposed settlement, however, provides only for the payment of money damages in satisfaction of "all claims." It would seem quite unlikely that defendant would again send a letter of a type resulting in litigation that it has agreed to pay hundreds of thousands of dollars to resolve. The proposed agreement, however, contains no consent to an injunction or other prospective relief. Yet, the proposed class would include persons who may receive the subject letters after the class is certified and notified, and even after entry of a final order approving payment of the settlement proceeds. Even putting aside questions of class eligibility and notification, this hinders the ability of current class members to make an informed opt-out decision and of the court to determine the fairness of the proposed settlement as it provides for a pro rata

distribution of a fixed amount.

The court is also concerned about the provision in the settlement agreement by which the claims of any class members for whom a current mailing address cannot be located by use of "reasonable measures" would effectively be extinguished. A class member who does not receive actual notice may still be bound by a class settlement if he received constructive notice in a manner that conforms with due process. See Peters v. National R.R. Passenger Corp., 966 F.2d 1483, 1484 (D.C. Cir. 1992). In the instant case, persons could be deprived of legal rights without actual or constructive notice and without any corresponding benefit. As the limitations period is relatively short, see 15 U.S.C. § 1692k(d), perhaps this concern could be obviated by placing shares of the proceeds for any such persons in escrow until the natural extinction of their claims with the expiration of the limitations period. If such a persons could not be located during that period with due diligence, it may then not offend due process to distribute his share to others.

While the amount of attorney fees is expressed in terms of a ceiling, the court would be remiss were it not to note that a 70% fee in a common fund case seems rather excessive. The general range of attorney fees in such cases in 19% to 45% of the settlement fund. See In re Smithkline Beckman corp. Sec. Lit., 751 F. Supp. 525, 544 (E.D. Pa. 1990). While the particular

circumstances of each case should be considered, one circuit court has noted with approval the suggestion of a 25% benchmark. See Paul, Johnson, Alston & Hunt v. Graulty, 886 F. 2d 268, 272 (9th Cir. 1989). See also Strang v. JHM Mortgage Sec. Limited Partnership, 890 F. Supp. 499, 503 (E.D. Va. 1995) (proposed fee of 30% of $1,150,000 fund found excessive).

Before ruling on the pending motion, the court will give the parties an opportunity to address these questions and to advise the court of their amenability to limiting the class to persons who qualify as of the time of certification and notice.

ACCORDINGLY, this day of July, 1999, upon consideration of plaintiff's Motion for Preliminary Approval of Settlement and Notice to Class (Doc. #32), consistent with the foregoing, **IT IS HEREBY ORDERED** that the parties shall have until July 29, 1999 to brief the issue of the eligibility of potential future class members or to redefine the class, to brief the issue of the propriety of the provision by which the claims of some class members could be extinguished without any corresponding benefit and to reconsider whether even when phrased as a limitation, a 70% fee may be excessive.

BY THE COURT:

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JAY C. WALDMAN, J.